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## Credit Card Fraud: The Neglected Crime

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## COMMENT

### CREDIT CARD FRAUD: THE NEGLECTED CRIME

#### I. INTRODUCTION

Credit cards are an integral part of the American economy.<sup>1</sup> Due to the widespread use of credit cards and checks, we have become a "cashless society."<sup>2</sup> Credit card usage has grown rapidly,<sup>3</sup> therefore, "[t]he plastic credit card seems destined to replace the paper check as the primary means of paying for goods and services."<sup>4</sup> The extensive use of credit cards, however, has its drawbacks.

Credit card fraud is foremost among these problems.<sup>5</sup> The to-

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<sup>1</sup> For an early observation of the role of credit cards in the American economy, see Note, *The Apportionment of Credit Card Fraud Loss*, 4 U.C.D. L. REV. 377, 377 (1971).

<sup>2</sup> In 1972, an Illinois Commission on credit card fraud observed that we were "quickly becoming a cashless society." ILL. LEG. INVESTIGATING COMM'N, CREDIT CARD FRAUD IN ILLINOIS (1972). Two years later, Justice White declared that the country had entered the "era of the 'cashless' society." *United States v. Maze*, 414 U.S. 395, 416 (1974) (White, J., dissenting). See also Landey, *Consumer Cardholder Defenses in Tripartite Credit Card Arrangements: A Battleground for the Beleaguered Bank*, 88 COM. L.J. 84, 84 (1983).

<sup>3</sup> J. FONSECA & P. TEACHOUT, *HANDLING CONSUMER CREDIT CASES* § 10.7 (2d ed. 1980) (reporting geometric increase in credit card usage). In 1984, consumer credit purchases totalled 296 billion dollars, which is approximately a six hundred percent increase over the amount of credit card purchases in 1970. See *NEWSWEEK*, July 8, 1985, at 52; Note, *supra* note 1, at 377.

<sup>4</sup> J. FONSECA & P. TEACHOUT, *supra* note 3, at § 10.1; see also *The Credit Card Protection Act: Hearings Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance, and Urban Affairs on H.R. 2885 and H.R. 3622*, 98th Cong., 1st Sess. 287 (1983) [hereinafter cited as *House Hearings*] (statement of the National Retail Merchants Association). In the United States, 116 million people own 720 million active credit cards. See *FORBES*, Nov. 5, 1984, at 229; *L.A. Times*, March 18, 1984, § 5, at 3.

<sup>5</sup> See *U.S. NEWS & WORLD REP.*, Oct. 3, 1983, at 78; see also *NATION'S BUS.*, May 1984, at 20 (credit card fraud is fastest growing crime against business). The amount of fraud perpetrated against the two major bank cards (VISA and Mastercard) in 1982 was 125.8 million dollars, which was two and a half times greater than the amount of money stolen in bank robberies. See *Credit Card Fraud, Hearing before the Subcomm. on Consumer Affairs of the Sen. Comm. on Banking, Housing, and Urban Affairs*, 98th Cong., 1st Sess. 82 (1983) [hereinafter cited as *Senate Hearing*] (statement of John G. Alexander, Chairman of the American Banking Association); *House Hearings, supra* note 4, at 265 (statement of Sandra

tal amount of credit card fraud in 1982, including that which involved bank cards, retail store cards, and gas cards, was approximately one billion dollars, and annual losses soon could reach two billion dollars.<sup>6</sup> The cost of this fraud ultimately is borne by the consumer.<sup>7</sup>

Several factors explain the enormous rise in credit card fraud.<sup>8</sup> First, the increased use of credit cards contributes to increased credit card fraud. Increased card usage, however, accounts for only a portion of the escalation of credit card fraud because card fraud is growing considerably faster than overall card usage.<sup>9</sup>

Second, the ease with which an individual can commit credit card fraud contributes to the problem.<sup>10</sup> Potential criminals can obtain credit cards or account numbers and know that a cardholder cannot easily detect this fraud. A variety of people regularly handle others' credit cards or account numbers,<sup>11</sup> therefore, a cardholder has difficulty identifying the thief. Furthermore, the cardholder is unlikely to discover the fraud in time to prevent it,<sup>12</sup> especially if the criminal steals an account number. Frequently, cardholders do not know that unauthorized persons have used their credit cards or ac-

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J. McLaughlin, Senior Vice-President of Mellon Bank); S. REP. NO. 368, 98th Cong., 2d Sess. 2 (1984). See also *Senate Hearing*, *supra* note 5, at 13 (statement of Charles P. Nelson, Assistant Chief Postal Inspector for Criminal Investigation); *id.* at 18 (statement of Senator D'Amato).

<sup>6</sup> See *Senate Hearing*, *supra* note 5, at 1 (statement of Senator Hawkins); H.R. REP. NO. 426, 98th Cong., 1st Sess. 2 (1983); N.Y. Times, May 22, 1983, § 3, at 12.

<sup>7</sup> See U.S. NEWS & WORLD REP., *supra* note 5, at 78 (customers pay for costs of credit card fraud through higher interest rates and larger annual card fees).

<sup>8</sup> Card issuers have been unsuccessful in limiting credit card fraud despite developing cards that are difficult to counterfeit and financing "sting" operations aimed at catching credit card fraud criminals. See U.S. NEWS & WORLD REP., *supra* note 5, at 79 (VISA began financing a "sting" operation); N.Y. Times, *supra* note 6, at 12 (issuers developing carbonless forms); N.Y. Times, March 2, 1983, § 4, at 20 (Mastercard added hard to duplicate hologram to their credit card). While issuers may have some short-term impact, criminals usually quickly overcome new issuer security measures. See *Senate Hearing*, *supra* note 5, at 14 (statement of Charles P. Nelson, Assistant Chief Postal Inspector for Criminal Investigation); U.S. NEWS & WORLD REP., *supra* note 5, at 79.

<sup>9</sup> See H.R. REP. NO. 426, *supra* note 6, at 2; SAT. EVENING POST, July/Aug. 1984, at 128 (American Banking Association predicted that credit card fraud would double in 1984); N.Y. Times, *supra* note 6, at 12.

<sup>10</sup> See SAT. EVENING POST, *supra* note 9, at 128 (quoting Kurt Watson, Vice-President of the Fourth National Bank of Wichita, Kansas); Wall St. J., Jan. 24, 1983, at 23; Wall St. J., Jan. 11, 1983, at 37 (quoting George Fernandez, Fraud & Forgery Supervisor for Miami Police Department).

<sup>11</sup> According to Larry Schwartz of the Fraud & Theft Information Bureau, "each actively used credit card passes through over 1,000 hands each year. . . ." L.A. Times, *supra* note 4, at 3.

<sup>12</sup> See generally Comment, *Unauthorized Use of Credit Cards and Some Related Questions: What Problems Remain?*, 62 Ky. L.J. 881 (1974).

count numbers until they receive their monthly statements.<sup>13</sup> Thus, credit card thieves make two-thirds of their purchases before owners suspect that their cards are being used fraudulently.<sup>14</sup>

Third, not only does credit card fraud usually remain undetected until long after the criminal has completed the crime, but also law enforcement efforts are lax.<sup>15</sup> Law enforcement agencies have "paid little attention to this genre of crime."<sup>16</sup> Thus, these agencies are partially responsible for the growth in credit card fraud.

Finally, although these factors all contribute to the problem of credit card fraud, inadequate state and federal laws are the biggest reason for the success of credit card fraud.<sup>17</sup> As this Comment will demonstrate, prosecutors litigate organized fraud schemes primarily at the federal level which is where the weaknesses in the laws have been the most glaring.

While petty crimes constitute the majority of credit card fraud incidents,<sup>18</sup> this Comment focuses on the fraud committed in large organized schemes that account for half of the total dollar amount of credit card fraud.<sup>19</sup> Nevertheless, the states have a vital role in combatting credit card fraud because they are better equipped than the federal government to prosecute local crimes.<sup>20</sup> There is an amalgam of state statutes,<sup>21</sup> each statute having its own idiosyncra-

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<sup>13</sup> See *Card Holder Can Reduce Risk of Unauthorized Use*, Wall St. J., Jan. 24, 1983, at 23 (citing study by American Bankers Association Task Force).

<sup>14</sup> *Senate Hearing*, *supra* note 5, at 43 (statement of William Neumann, Vice-President of Security for VISA International).

<sup>15</sup> *Id.* The agency most responsible for enforcement of federal credit card fraud statutes is the United States Postal Service, which investigated only eighty cases in 1982. *Id.* The Secret Service has "done little direct work on credit card counterfeiting." *Id.* The FBI has excellent investigative skills, but "has been very restrained in its handling of credit-card cases. . . ." *ACROSS THE BD.*, Sept. 1983, at 18 (quoting Donal Merkley, Head of Security for the Wells Fargo Bank).

<sup>16</sup> *ACROSS THE BD.*, *supra* note 15, at 18.

<sup>17</sup> See generally *Senate Hearing*, *supra* note 5; *House Hearings*, *supra* note 4.

<sup>18</sup> Seventy-two percent of fraudulent credit card transactions are for less than \$150 each. See *Senate Hearing*, *supra* note 5, at 66 (Appendix C, supplied by VISA International). Furthermore, "[t]he average credit card loss is \$75 per card." L.A. Times, *supra* note 4, at 3 (quoting Tony Adamski, chief of FBI's financial crimes unit).

<sup>19</sup> See *Senate Hearing*, *supra* note 5, at 66 (Appendix C, supplied by VISA International) (criminals commit half of the dollar amount of credit card fraud in fraudulent transactions worth at least five hundred dollars). Organized crime is involved substantially in large credit card fraud schemes. See generally S. REP. NO. 368, *supra* note 5, at 2; H.R. REP. NO. 426, *supra* note 6, at 2; *ACROSS THE BD.*, *supra* note 15, at 13-14; U.S. NEWS & WORLD REP., *supra* note 5, at 78.

<sup>20</sup> See S. REP. NO. 368, *supra* note 5, at 5. Furthermore, the federal government does not have the resources to prosecute all credit card fraud. L.A. Times, *supra* note 4, at 3 (quoting Tony Adamski, chief of FBI's financial crimes unit).

<sup>21</sup> See, e.g., ALA. CODE § 13A-9-14 (1982); ALASKA STAT. §§ 11.46.285-.290 (1983); ARIZ. REV. STAT. ANN. §§ 13-2101 to -2108 (1978); ARK. STAT. ANN. §§ 41-2301 (1977);

cies.<sup>22</sup> Prosecutors try most large credit card fraud cases at the fed-

CAL. PENAL CODE §§ 484d-484j (West 1984); COLO. REV. STAT. §§ 18-5-201 to -204 (1973); CONN. GEN. STAT. ANN. §§ 53a-128a to -128i (West 1972); DEL. CODE ANN. tit. 11, §§ 903-904 (1979); FLA. STAT. ANN. § 817.481 (West 1976); GA. CODE ANN. §§ 16-9-30 to -39 (1983); HAWAII REV. STAT. §§ 851-1 to -12 (1976); IDAHO CODE §§ 18-3122 to -3127 (Supp. 1984); Illinois Credit Card Act, ILL. REV. STAT. ch. 17, §§ 5901-5933 (1983); IND. CODE ANN. § 35-43-5-4 (Burns 1979); IOWA CODE ANN. §§ 715.1-7 (West 1979); KAN. STAT. ANN. § 21-3729 (1981); Credit and Debit Card Crime Act, KY. REV. STAT. ANN. §§ 434.550-.730 (Bobbs-Merrill Supp. 1984); LA. REV. STAT. ANN. § 14.67.3 (West Supp. 1984); ME. REV. STAT. ANN. tit. 17A, § 905 (1983); MD. ANN. CODE art. 27, § 145 (Supp. 1983); MASS. GEN. LAWS ANN. ch. 266, §§ 37A-37D (West 1981); MICH. COMP. LAWS ANN. §§ 28.354(13)-.354(18) (West 1981); MINN. STAT. ANN. § 609.52(3)(c) (West Supp. 1984); Mississippi Credit Card Crime Law of 1968, MISS. CODE ANN. §§ 97-19-5 to -29 (Supp. 1983); MO. ANN. STAT. § 570.130 (Vernon 1979); MONT. CODE ANN. § 45-6-317 (1983); NEB. REV. STAT. § 28-512(4) (1979); NEV. REV. STAT. §§ 205.610-.810 (1983); N.H. REV. STAT. ANN. § 638.5 (Supp. 1979); N.J. STAT. ANN. § 2C:21-6 (West 1982); N.M. STAT. ANN. §§ 30-16-25 to -38 (1984); N.Y. PENAL LAW § 165.17 (McKinney 1975); N.C. GEN. STAT. §§ 14-113.1 to .17 (1981); OHIO REV. CODE ANN. § 2913.21 (Baldwin 1983); Oklahoma Credit Card Crime Act of 1970, OKLA. STAT. ANN. tit. 21, §§ 1550.1 to .38 (West 1983); ORE. REV. STAT. § 165.055 (1983); PA. STAT. ANN. tit. 18, § 4106 (Purdon 1983); Credit Card Crime Act, R.I. GEN. LAWS §§ 11-49-1 to -13 (1981); Financial Transaction Card Crime Act, S.C. CODE ANN. §§ 16-14-10 to -100 (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 2-30A-8.1 (1979); State Credit Card Crime Act, TENN. CODE ANN. §§ 39-3-501 to -513 (1982); TEX. PENAL CODE ANN. § 32.31 (Vernon 1974); UTAH CODE ANN. § 76-6-506 (Supp. 1983); VT. STAT. ANN. tit. 9, §§ 4041-4045 (1970); VA. CODE § 18-2-191 to -197 (1982); W. VA. CODE § 61-3-24a (1977); WIS. STAT. ANN. § 943.41 (West Supp. 1984); WYO. STAT. § 6-3-802 (1977). The District of Columbia and Puerto Rico also have credit card fraud statutes. See D.C. CODE ANN. § 22-3823 (Supp. 1984); P.R. LAWS ANN. tit. 33, § 4556 (1976). A provision for credit card fraud also appears in the Model Penal Code. See MODEL PENAL CODE § 224.6 (1962). Two states, North Dakota and Washington, do not have a credit card fraud statute and neither does the Virgin Islands. This Comment will exclude these states when discussing the number of states without certain provisions.

<sup>22</sup> For example, just over half of the states explicitly punish the unauthorized use of a credit card account number. See, e.g., ARIZ. REV. STAT. ANN. § 13-2105; ARK. STAT. ANN. § 41-2302; CAL. PENAL CODE § 484f; COLO. REV. STAT. §§ 18-5-201 to -204; CONN. GEN. STAT. ANN. § 53a-128c; DEL. CODE ANN. tit. 11, §§ 903, 904; FLA. STAT. ANN. § 817.481; GA. CODE ANN. § 16-9-39; IDAHO CODE § 18-3124; KAN. STAT. ANN. § 21-3729; KY. REV. STAT. ANN. § 434.630; ME. REV. STAT. ANN. tit. 17A, § 905; MASS. GEN. LAWS ANN. ch. 266, § 37C; MONT. CODE ANN. § 45-6-317; NEV. REV. STAT. § 205.740; N.J. STAT. ANN. § 2C:21-6; N.C. GEN. STAT. § 14-113.1 to .17; OKLA. STAT. ANN. tit. 21, §§ 1550.1-.38; ORE. REV. STAT. § 165.055; PA. STAT. ANN. tit. 18, § 4106; R.I. GEN. LAWS § 11-49-3; S.C. CODE ANN. § 16-14-40; TENN. CODE ANN. §§ 39-3-501 to -513; TEX. PENAL CODE ANN. § 32.31; UTAH CODE ANN. § 76-6-506; VA. CODE § 18-2-193; W. VA. CODE § 61-3-242; WYO. STAT. § 6-3-802. The District of Columbia has the same provision. D.C. CODE ANN. § 22-3823. For a discussion of the federal treatment of the fraudulent use of credit card account numbers, see *infra* notes 40-58, 103 and accompanying text.

All but three states prohibit schemes in which the initial cardholder transfers a credit card knowing that the transferee will use the card fraudulently. See, e.g., MONT. CODE ANN. § 45-6-317; N.Y. PENAL LAW § 165.17; S.D. CODIFIED LAWS § 22-30A-8.1. For a description of these schemes in the federal context, see *infra* notes 67-69, 105-06 and accompanying text.

In approximately half the states, the mere possession of a stated number of fraudulent credit cards is a crime, and in only a few states is the requisite number of cards

eral level; consequently, it is beyond the scope of this Comment to analyze the states' credit card fraud laws.

After examining the shortcomings in the old federal credit card statute, this Comment will analyze the impact of the Credit Card Fraud Act of 1984 on credit card fraud. Overall, this Comment argues that the Act, which is a section of the Comprehensive Crime Control Act of 1984, corrects many of the weaknesses in the old federal statutes and should prove quite helpful in reducing credit card fraud. It might, however, also create several serious problems.

## II. THE FEDERAL SCHEME

The federal government uses several different statutes to prosecute credit card fraud. Prosecutors frequently utilize section 1644 of the Truth in Lending Act<sup>23</sup> and the mail fraud<sup>24</sup> and wire fraud<sup>25</sup> statutes to prosecute credit card fraud. Of the three statutes, only section 1644 is specifically designed for credit card fraud. Congress enacted section 1644 in 1970 in response to the emergence of credit cards as a major factor in the economy.<sup>26</sup> The statute prohibits using an illegal card<sup>27</sup> or receiving goods purchased with one.<sup>28</sup> For

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greater than two. See, e.g., ALA. CODE § 13A-9-14; ALASKA STAT. § 11.46.290; ARIZ. REV. STAT. ANN. § 13-2106; CAL. PENAL CODE § 484i; COLO. REV. STAT. § 18-5-204; CONN. GEN. STAT. ANN. § 53a-128f; FLA. STAT. ANN. § 817.63; GA. CODE ANN. § 16-9-31; HAWAII REV. STAT. § 851.6; IDAHO CODE § 18-3125; ILL. REV. STAT. ch. 17, §§ 5901-5933; KY. REV. STAT. ANN. § 434.680; MASS. GEN. LAWS ANN. ch. 266, § 37B (statute prohibits possession of four or more illegal credit cards); MICH. COMP. LAWS ANN. § 28.354(16); NEV. REV. STAT. § 205.730; N.J. STAT. ANN. § 2C:21-6; N.M. STAT. ANN. § 30-16-30 (statute prohibits possession of four or more illegal credit cards); OHIO REV. CODE ANN. § 2913.21; OKLA. STAT. ANN. tit. 21, § 1550.2; R.I. GEN. LAWS § 11-49-3; S.C. CODE ANN. § 16-14-20; TENN. CODE ANN. § 39-3-504; TEX. PENAL CODE ANN. § 32.31; VA. CODE § 18-2-194. For a discussion of the federal treatment of the possession of an illegal credit card, see *infra* notes 70-73, 107-08 and accompanying text.

Only nine states do not prohibit an attempt to commit credit card fraud. See, e.g., ALASKA STAT. §§ 11.46.285-290; ARK. STAT. ANN. § 41-2301; KY. REV. STAT. ANN. § 434.550-.730; LA. REV. STAT. ANN. § 14.67.3; MICH. COMP. LAWS ANN. §§ 28.354(13)-.354(18); MINN. STAT. ANN. § 609.52(3)(c); MO. ANN. STAT. § 570.130; OHIO REV. CODE ANN. § 2913.21; S.D. CODIFIED LAWS ANN. § 22-30A-8.1. The District of Columbia's Code has the same shortcoming. See D.C. CODE ANN. § 22-3823. The Model Penal Code also fails to punish attempted credit card fraud. See MODEL PENAL CODE § 224.6.

<sup>23</sup> 15 U.S.C. § 1644 (1982).

<sup>24</sup> 18 U.S.C. § 1341 (1982).

<sup>25</sup> 18 U.S.C. § 1343 (1982).

<sup>26</sup> For a legislative history of the Truth in Lending Act, see Weistart, *Consumer Protection in the Credit Card Industry: Federal Legislative Controls*, 70 MICH. L. REV. 1475 (1972).

<sup>27</sup> 15 U.S.C. § 1644 defines an illegal credit card as "any counterfeit, fictitious, altered, forged, lost, stolen or fraudulently obtained credit card. . . ." *Id.*

<sup>28</sup> The most frequently invoked subsection of § 1644 defines a credit card criminal as follows:

Whoever knowingly in a transaction affecting interstate or foreign commerce, uses

section 1644 to apply, a person must commit at least one thousand dollars of credit card fraud in a one year period.<sup>29</sup> The statute does not outlaw the use of an unauthorized account number, but rather, prohibits only the use of an illegal card.<sup>30</sup>

Because credit card fraud is not the primary focus of the Truth in Lending Act, the Act is not as helpful in prosecuting credit card fraud as it could be. Congress wanted the Truth in Lending Act to protect consumers; however, the Act does not mention credit card fraud in the purpose section of the statute.<sup>31</sup> The reason for this omission is that the primary purpose of the Truth in Lending Act is to promote the informed use of credit, not to reduce credit card fraud.<sup>32</sup> Nevertheless, one commentator has stated that Congress passed the law to protect the consumer,<sup>33</sup> and the judiciary has adopted this interpretation of the Truth in Lending Act.<sup>34</sup>

Federal authorities also have used other statutes to prosecute credit card fraud. Chief among these is the mail fraud statute.<sup>35</sup> This statute prohibits the use of the mail to perpetrate credit card fraud. Similarly, the wire fraud statute proscribes the use of wire communication equipment to accomplish a fraudulent credit card scheme.<sup>36</sup>

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or attempts to use any counterfeit, fictitious, altered, forged, lost, stolen, or fraudulently obtained credit card to obtain money, goods, services, or anything else of value which within any one-year period has a value aggregating \$1,000 or more. . . . Truth in Lending Act, 15 U.S.C. § 1644(a) (1982). Section 1644(d) of the Truth in Lending Act prohibits the receipt of goods obtained in violation of 15 U.S.C. § 1644(a).

<sup>29</sup> *Id.*

<sup>30</sup> The definition of "credit card" provided in the Act includes any "credit device." 15 U.S.C. § 1682(k).

<sup>31</sup> See 15 U.S.C. § 1601 (outlines general purpose of Act).

<sup>32</sup> See generally Weistart, *supra* note 26.

<sup>33</sup> Comment, *supra* note 12, at 893.

<sup>34</sup> See, e.g., *Martin v. American Express*, 361 So. 2d 597, 600 (Ala. Civ. App. 1978) (dicta suggests that courts should construe the Act liberally in favor of consumers).

<sup>35</sup> The mail fraud statute reads as follows:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than \$1,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1341 (1982).

<sup>36</sup> The wire fraud statute parallels the mail fraud statute, except that it applies to

Prosecutors use the preceding statutes to prosecute credit card fraud. The Right to Financial Privacy Act of 1978<sup>37</sup> regulates credit card fraud investigations. The statute specifies the parameters within which the enforcement agencies may question credit card issuers about fraud.<sup>38</sup> Law enforcement agencies must already be conducting an inquiry into a specific potential violation before the issuer has to release the relevant records.<sup>39</sup>

### III. PROBLEMS WITH THE OLD FEDERAL LAWS

Before the passage of the Comprehensive Crime Control Act of 1984, the federal statutory scheme for credit card fraud had several weaknesses. The major problems included: the prosecution of criminals who committed credit card fraud by using the credit card account number, but not the credit card itself; the aggregation requirement; the definition of fraudulent acts; the use of the mail and wire fraud statutes to prosecute credit card fraud; and, the financial privacy laws.

#### A. ACCOUNT NUMBER

Criminals do not need an actual credit card to commit fraud. All they need is the account number. For instance, criminals can print white plastic by using the account number without the actual credit card. In white plastic schemes, criminals emboss account numbers on plain pieces of plastic. Next, they imprint invoices with these cards; then, collusive merchants accept these invoices, thereby completing the scheme.<sup>40</sup> Counterfeiters also can print cards with actual credit card numbers that they obtain in a variety of ways, including from carbons of credit card purchase receipts.<sup>41</sup> Furthermore, by using an unauthorized credit card number to purchase products by mail order, criminals can accomplish credit card fraud without using the actual card.<sup>42</sup>

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wires used in communication rather than the mail used in communication. See 18 U.S.C. § 1343 (1982).

<sup>37</sup> See 12 U.S.C. §§ 3401-22 (1982).

<sup>38</sup> 12 U.S.C. § 3405. The Right to Financial Privacy Act regulates banks and applies to credit card issuers because the issuers of the major credit cards are banks.

<sup>39</sup> See, e.g., *Senate Hearing*, *supra* note 5, at 4 (statement of James Knapp, Assistant Attorney General for the Criminal Division of the Department of Justice).

<sup>40</sup> See *Wall St. J.*, *supra* note 13, at 23 (authorities in Miami break up multi-million dollar white plastic ring).

<sup>41</sup> See generally *Senate Hearing*, *supra* note 5; *House Hearings*, *supra* note 4; H.R. REP. NO. 894, 98th Cong., 2d Sess. (1984); S. REP. NO. 368, *supra* note 5; H.R. REP. NO. 426, *supra* note 6; U.S. NEWS & WORLD REP., *supra* note 5.

<sup>42</sup> See *United States v. Bice-Bey*, 701 F.2d 1086 (4th Cir.), *cert. denied*, 464 U.S. 837 (1983); *King v. United States*, 512 F.2d 353 (6th Cir. 1975).



Courts have split over whether section 1644 penalizes the unauthorized use of an account number, or whether the law penalizes only the illegal use of a credit card. The two appeals courts that have heard cases on this point disagree on the issue.<sup>43</sup>

The first of these cases was *United States v. Callihan*.<sup>44</sup> In *Callihan*, the appellant communicated the illegally obtained numbers by telephone across state lines.<sup>45</sup> The district court found Callihan guilty of three counts of wire fraud and five counts of credit card fraud.<sup>46</sup> The Court of Appeals for the Ninth Circuit unanimously affirmed the wire fraud convictions, but reversed the credit card fraud convictions.<sup>47</sup> The majority held that Congress clearly intended to exclude the use of account numbers from the ambit of section 1644.<sup>48</sup> The court noted that otherwise Congress would have specifically prohibited the illegal use of mere account numbers, as it did in the mail and wire fraud statutes.<sup>49</sup>

One year after *Callihan*, the Fourth Circuit held that section 1644 does prohibit the unauthorized use of account numbers.<sup>50</sup> In *United States v. Bice-Bey*,<sup>51</sup> the appellant ordered merchandise from an out-of-state firm by using an unauthorized card number.<sup>52</sup> The court found her liable under section 1644 for credit card fraud.<sup>53</sup> The unanimous court acknowledged that there was some merit in the appellant's contention that section 1644 proscribed only fraudulent credit card usage and not the unauthorized use of an account number.<sup>54</sup> The court, however, dismissed the arguments as unconvincing and held that the judiciary must construe section 1644 as prohibiting the fraudulent use of a mere account number so as "not to defeat the congressional purpose. . . ."<sup>55</sup> The Fourth Circuit stated that because the account number is the core element of a

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<sup>43</sup> See *Bice-Bey*, 701 F.2d at 1086 (illegal use of account number violates § 1644); *United States v. Callihan*, 666 F.2d 422 (9th Cir. 1982) (use of account number without card does not violate § 1644).

<sup>44</sup> 666 F.2d 422 (9th Cir. 1982).

<sup>45</sup> *Id.* at 423.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> The court concluded that "the term 'credit card' as used in section 1644 means the small, flat tablet upon which a credit card account number is imprinted, but does not mean that number alone." *Id.* at 424.

<sup>49</sup> *Id.*

<sup>50</sup> *Bice-Bey*, 701 F.2d 1086 (4th Cir.), *cert. denied*, 464 U.S. 837 (1983).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1088-89.

<sup>53</sup> *Id.* at 1092.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (court rejected defendant's argument as overly literalistic reading of the statute).

credit card, fraudulent use of the account number itself violates section 1644.<sup>56</sup>

The Ninth Circuit's definition of a credit card for the purposes of section 1644 is clearly the correct one because the Truth in Lending Act defines a credit card as a device.<sup>57</sup> Thus, the statute does not prohibit the fraudulent use of an account number because an account number is an intangible, not a device. Yet, criminals can commit a substantial amount of credit card fraud without possessing the card.<sup>58</sup> Therefore, the narrow definition of a credit card is a large loophole in section 1644.

#### B. AGGREGATION

Section 1644 prohibits only "transaction[s] . . . within any one-year period that ha[ve] a value aggregating \$1,000 or more. . . ."<sup>59</sup> On its face, the statute appears to mandate charges on one card of at least one thousand dollars. Federal authorities, therefore, have not attempted to prosecute several criminals who amass less than one thousand dollars of charges on one credit card.<sup>60</sup> Consequently, criminals have used numerous fraudulent cards to compile total charges well in excess of one thousand dollars, but have been careful not to incur charges on any individual card greater than one thousand dollars.<sup>61</sup>

The Fifth Circuit is currently the sole proponent of the minority position that the jurisdictional amount in section 1644 can be met by aggregating purchases made using several fraudulent cards.<sup>62</sup> In *United States v. Mikelberg*,<sup>63</sup> a unanimous court held that Congress ob-

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<sup>56</sup> *Id.* Accord *State v. Howard*, 221 Kan. 51, 557 P.2d 1280 (1976) (using account number fraudulently is equivalent to using credit card itself fraudulently). After the *Howard* decision, the Kansas legislature changed the statute to include a mere account number in the definition of a financial card. See KAN. STAT. ANN. § 21-3729(2)(a) (1981). See also *Bice-Bey*, 701 F.2d at 1092 (dicta urging the Supreme Court to resolve dispute over whether fraudulent use of just account number constitutes credit card fraud).

<sup>57</sup> See *supra* note 30.

<sup>58</sup> For examples of how criminals commit fraud by using just an account number, see *supra* notes 40-42 and accompanying text.

<sup>59</sup> 15 U.S.C. § 1644(a).

<sup>60</sup> See, e.g., *House Hearings*, *supra* note 4, at 178 (statement of John C. Keeney, Deputy Assistant Attorney General for the Criminal Division of the Department of Justice). The federal government usually will not prosecute credit card fraud unless the amount in question is at least \$10,000; in the more overloaded federal district courts, the amount tends to be at least \$50,000. See *NATION'S BUS.*, *supra* note 5, at 24.

<sup>61</sup> H.R. REP. NO. 894, *supra* note 41, at 5.

<sup>62</sup> See *United States v. Mikelberg*, 517 F.2d 246 (5th Cir. 1975), *cert. denied*, 424 U.S. 909 (1976).

<sup>63</sup> 517 F.2d 246.

viously intended such aggregation.<sup>64</sup> According to the court, to hold otherwise would eviscerate the power of section 1644.<sup>65</sup> While the Fifth Circuit's liberal construction of the aggregation requirement is dubious, the court was accurate in contending that any other construction of section 1644 would destroy its effectiveness. The interpretation of the majority of courts of the aggregation requirement, however, renders the statute too narrow to effectively combat credit card fraud.

### C. REQUISITE FRAUDULENT ACT

In order to be within the purview of section 1644, a person must "knowingly . . . use any counterfeit, fictitious, altered, forged, lost, stolen or *fraudulently obtained* credit card. . . ."<sup>66</sup> This portion of the statute contains two loopholes. First, the expression "fraudulently obtained" is underinclusive: it excludes some behavior that is unauthorized by the issuing credit card company. Parties enter transactions whereby cardholders sell their cards to other individuals.<sup>67</sup> The cardholders then report their cards as lost or stolen, while the card purchasers amass large bills.<sup>68</sup> These card buyers are not subject to the provisions of the statute because they obtained the credit cards without using fraud.<sup>69</sup>

Second, section 1644 does not prohibit the mere possession of fraudulent credit cards or counterfeiting equipment.<sup>70</sup> Therefore, law enforcement officials must apprehend these criminals actually purchasing merchandise with the fraudulent credit cards. As a result, prosecutors have a very difficult time proving that a person has violated the statute.<sup>71</sup>

The need for a statute forbidding the possession of fraudulent

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<sup>64</sup> *Id.* at 251-52. The court was interpreting 15 U.S.C. § 1644 as it read before the 1974 amendment that reduced the jurisdictional amount from \$5,000 to \$1,000. The court took on judicial notice that fraudulent purchases on an individual card rarely exceed five thousand dollars. *Id.*

<sup>65</sup> *Id.* at 252.

<sup>66</sup> 15 U.S.C. § 1644(a) (emphasis added).

<sup>67</sup> See *Senate Hearing*, *supra* note 5, at 5 (statement of James Knapp, Assistant Attorney General for the Criminal Division of the Department of Justice).

<sup>68</sup> *Id.*

<sup>69</sup> See, e.g., *United States v. Kasper*, 483 F. Supp. 1208 (E.D. Pa. 1980) (defendants received credit cards from cardholders and were found not guilty of violating § 1644 because although defendants' intents were fraudulent, they did not obtain cards fraudulently).

<sup>70</sup> 15 U.S.C. § 1644(a).

<sup>71</sup> Experts believe that possession of illegal credit cards should be a federal crime. See *House Hearings*, *supra* note 4, at 178 (statement of John C. Keeney, Deputy Assistant Attorney General of the Criminal Division of the Department of Justice); 130 CONG. REC. H7631 (daily ed. July 24, 1984) (statement of Representative Sawyer). See generally

credit cards is apparent in cases where the cardholder lied in order to obtain the card. If there is not a statute prohibiting the mere possession of illegal credit cards, the prosecutor must demonstrate that the issuer relied on a false statement of the cardholder.<sup>72</sup> Also, without this type of statute, law enforcement officials have the potentially nettlesome problem of proving that a criminal fraudulently obtained a credit card.<sup>73</sup> This loophole in section 1644 forces the government to establish much more than mere possession of illegal credit cards, even though unauthorized possession is a sufficiently serious crime to warrant prosecution.

#### D. MAIL AND WIRE FRAUD STATUTES

The mail and wire fraud statutes sometimes are applicable in credit card fraud cases.<sup>74</sup> These statutes are difficult for prosecutors to utilize, however, because the statutes require prosecutors to demonstrate a nexus between the use of the mail or wires and the execution of the fraud.<sup>75</sup>

In *United States v. Maze*,<sup>76</sup> the defendant stole his roommate's credit card and used the card in several states.<sup>77</sup> Innocent merchants then mailed the sales slips from Maze's purchases across state lines to the issuing bank.<sup>78</sup> Maze did not violate section 1644 because the amount of his fraudulent credit card purchases was less than the statutory amount,<sup>79</sup> and therefore, the federal authorities were forced to prosecute Maze under the mail fraud statute.<sup>80</sup>

The United States Supreme Court<sup>81</sup> affirmed the judgment of

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H.R. REP. NO. 894, *supra* note 41; S. REP. NO. 368, *supra* note 5; H.R. REP. NO. 426, *supra* note 6.

<sup>72</sup> Cf. *United States v. Chapman*, 591 F.2d 1287, 1288 (9th Cir. 1979) (credit card issuer must show tendency to rely on false information supplied by the criminal).

<sup>73</sup> See, e.g., *United States v. Kay*, 545 F.2d 491, 493 (5th Cir.), *cert. denied*, 434 U.S. 833 (1977) (court, in split decision, decided that jury could have found that card was fraudulently obtained where defendant applied for credit card knowing that he would not pay bill).

<sup>74</sup> See *supra* notes 35-36 and accompanying text.

<sup>75</sup> See *United States v. Maze*, 414 U.S. 395 (1974) (Court held that nexus requirement of mail fraud statute was not satisfied).

<sup>76</sup> 414 U.S. 395 (1974).

<sup>77</sup> *Id.* at 396.

<sup>78</sup> *Id.*

<sup>79</sup> The statutory amount at that time was five thousand dollars, while the value of Maze's purchases was no more than two thousand dollars. See *id.* at 402 n.6.

<sup>80</sup> *Id.* at 397 n.1.

<sup>81</sup> The Court took this case in order to resolve a dispute between the circuits. *Id.* at 398 n.2. Five courts of appeals viewed the mailing of receipts as satisfying the statutory requirement of using the mails. See *United States v. Kelly*, 467 F.2d 267 (7th Cir. 1972), *cert. denied*, 411 U.S. 933 (1973); *United States v. Madison*, 458 F.2d 974 (2d Cir.), *cert. denied*, 409 U.S. 859 (1972); *United States v. Ciotti*, 469 F.2d 1204 (3d Cir. 1972); *United*

the Sixth Circuit<sup>82</sup> holding that the mailings of sales slips were insufficient for the mail fraud statute to govern the fraud.<sup>83</sup> The majority reasoned that Maze's scheme was complete when he received the goods and services.<sup>84</sup> According to this line of reasoning, it was irrelevant to Maze's scheme that merchants had mailed the sales slips across state lines.<sup>85</sup>

Chief Justice Burger dissented in order to emphasize that the majority's decision did not totally preclude the government from using the mail fraud statute to prosecute credit card fraud.<sup>86</sup> He concluded that the decision should be limited to its facts.<sup>87</sup> Justice White also dissented, stressing that it was the mailings that created the delay that enabled Maze to execute his scheme.<sup>88</sup> He also objected to the majority's narrow interpretation of section 1341.<sup>89</sup>

Prosecutions of credit card fraud under the mail fraud statute have decreased since *Maze*, but not to the degree predicted by the dissenters.<sup>90</sup> In cases in which people execute the fraud by submitting false credit card applications, the courts have held that the mail fraud statute applies.<sup>91</sup> Also, where merchants collaborate in the fraudulent scheme, the use of the mail is necessary to execute the scheme. Therefore, the Third Circuit held that the mail fraud stat-

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States v. Chason, 451 F.2d 301 (2d Cir. 1971), *cert. denied*, 405 U.S. 1016 (1972); United States v. Kellerman, 431 F.2d 319 (2d Cir.), *cert. denied*, 400 U.S. 957 (1970); United States v. Thomas, 429 F.2d 407 (5th Cir. 1970); United States v. Kelem, 416 F.2d 346 (9th Cir. 1969), *cert. denied*, 397 U.S. 952 (1970); Kloian v. United States, 349 F.2d 291 (5th Cir. 1965), *cert. denied*, 384 U.S. 913 (1966); Adams v. United States, 312 F.2d 137 (5th Cir. 1963). Two courts of appeals took the opposite view: the Sixth Circuit in *Maze*, 468 F.2d 529 (1972), and the Tenth Circuit in United States v. Lynn, 461 F.2d 759 (1972).

<sup>82</sup> The Supreme Court affirmed the judgment of the Sixth Circuit in a 5-4 decision. Justice Rehnquist wrote for the majority which also included Justices Douglas, Stewart, Marshall, and Powell. Joining Chief Justice Burger's dissent was Justice White. Chief Justice Burger and Justices Brennan and Blackmun joined Justice White's dissent.

<sup>83</sup> *Maze*, 414 U.S. at 405.

<sup>84</sup> The Court noted that "there is no indication that the success of [Maze's] scheme depended in any way on which of his victims ultimately bore the loss." *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 407 (Burger, C.J., dissenting).

<sup>87</sup> *Id.* (Burger, C.J., dissenting) (Chief Justice Burger stressed that triviality of alleged offenses was major reason for Court's decision).

<sup>88</sup> *Id.* at 414 (White, J., dissenting). The majority responded that the causes of the delay were the distance between the merchants and the bank, and most importantly, the credit card company's billing system. *Id.* at 403.

<sup>89</sup> *Id.* at 414-15 (White, J., dissenting).

<sup>90</sup> See *id.* at 416 (White, J., dissenting). See also *Senate Hearing*, *supra* note 5, at 6 (statement of Charles P. Nelson, Assistant Chief Postal Inspector for Criminal Investigation).

<sup>91</sup> See *King v. United States*, 512 F.2d 353 (6th Cir. 1975); *United States v. Stein*, 500 F.2d 678 (9th Cir. 1974).

ute applies to such an arrangement.<sup>92</sup>

The use of the wire fraud statute is a more recent development in the prosecution of credit card fraud.<sup>93</sup> In *United States v. Muni*,<sup>94</sup> the Court of Appeals for the Second Circuit held that a merchant participating in a fraudulent scheme over the telephone violated the wire fraud statute.<sup>95</sup> The court concluded that telephoning for authorization of the credit card purchase was a necessary part of the fraud; therefore, the merchant violated the wire fraud statute because he used the wires to perpetrate the credit card fraud.<sup>96</sup> In the later case of *United States v. DeBiasi*,<sup>97</sup> the Second Circuit extended this rationale one step further. In that case, the court held that a purchaser of merchandise in large fraudulent credit card transactions knows that the merchant must obtain telephone authorization, and thus violates the wire fraud statute.<sup>98</sup> The result of this theory is that the wire fraud statute applies in most credit card fraud cases.

#### E. FINANCIAL PRIVACY

In order to enforce the federal credit card laws, the government must be able to undertake thorough investigations of credit card charges. The financial privacy statute, however, limits investigators' access to cardholders' records<sup>99</sup> to situations in which the investigators already have begun an inquiry into a specific incident.<sup>100</sup>

In order to determine whether to begin an investigation of possible fraudulent credit card activity,<sup>101</sup> federal officials argue that investigators should have access to issuer records prior to the initiation of official investigations. Investigators could do a better

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<sup>92</sup> See *United States v. Adamo*, 534 F.2d 31 (3d Cir.), cert. denied, 429 U.S. 841 (1976).

<sup>93</sup> The first reported case was *United States v. Jones*, 554 F.2d 251 (5th Cir.), cert. denied, 434 U.S. 866 (1977) (defendant convicted of violating wire fraud statute by using unauthorized telephone credit card).

<sup>94</sup> 668 F.2d 87 (2d Cir. 1981).

<sup>95</sup> *Id.* (merchant used telephone to call across state lines to get approval for fraudulent transaction).

<sup>96</sup> *Id.* at 89-90.

<sup>97</sup> 712 F.2d 785 (2d Cir.), cert. denied, 464 U.S. 962 (1983).

<sup>98</sup> The court concluded that the defendant had violated the wire fraud statute because "it is common knowledge that authorization is required for large purchases." *Id.* at 792.

<sup>99</sup> See *supra* note 38 and accompanying text.

<sup>100</sup> See 12 U.S.C. § 3405(1). See also *Senate Hearing*, *supra* note 5, at 5 (statement of James Knapp, Deputy Assistant Attorney General for the Criminal Division of the Department of Justice).

<sup>101</sup> A federal official has proposed allowing investigators to examine bank records before they initiate an official inquiry. See *House Hearings*, *supra* note 4, at 178 (statement of John C. Keeney, Deputy Assistant Attorney General for the Criminal Division of the Department of Justice).

job of uncovering patterns of fraudulent behavior by having greater access to credit card records. This reform would not lead to undue intrusion upon a cardholder's privacy because the bank already has access to these records, and investigators would not reveal the discovered information.

#### IV. THE CREDIT CARD FRAUD ACT OF 1984

In 1984, Congress enacted the Credit Card Fraud Act, Chapter XVI of the Comprehensive Crime Control Act of 1984,<sup>102</sup> in an attempt to correct the deficiencies in section 1644 of the Truth in Lending Act. Although the Comprehensive Crime Control Act improves the definition of a fraudulent act and strengthens the penalty provisions, it also creates several problems.

##### A. REQUISITE FRAUDULENT ACT

The Credit Card Fraud Act of 1984 substantially improves the definition of criminal credit card activity. Perhaps most importantly, one provision provides that the use of an account number, without the card itself, can constitute credit card fraud.<sup>103</sup> Thus, section 1029 of the Act eliminates the "account number" loophole of the old statutory scheme.<sup>104</sup> Second, section 1029 states that an "unauthorized access device" includes one that is "obtained with intent to defraud. . . ."<sup>105</sup> This provision eliminates the "fraudulently obtained" loophole of the old statutory scheme.<sup>106</sup>

Third, the Act forbids the possession of fifteen or more illegal credit cards.<sup>107</sup> The fifteen card limit is, however, too high. A person in possession of ten illegal credit cards certainly is involved in major credit card fraud. With even a five card minimum, minor cases still would be kept out of the federal courts.<sup>108</sup> Although the

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<sup>102</sup> Credit Card Fraud Act of 1984, 18 U.S.C. § 1029 (1984).

<sup>103</sup> The statute prohibits the use of an unauthorized or fraudulent "access device," 18 U.S.C. § 1029(a), and states that

the term "access device" means any card, plate, code, *account number*, or other means of account access that can be used, alone or in conjunction with another access device, to obtain money, goods, services, or other thing of value, or that can be used to initiate a transfer of funds (other than a transfer originated solely by paper instrument). . . .

18 U.S.C. § 1029(e)(1)(emphasis added).

<sup>104</sup> See *supra* notes 40-58 and accompanying text.

<sup>105</sup> 18 U.S.C. § 1029(e)(3).

<sup>106</sup> For a discussion of the "fraudulently obtained" loophole, see *supra* notes 67-69 and accompanying text.

<sup>107</sup> 18 U.S.C. § 1029(a)(3).

<sup>108</sup> Committees in both the Senate and the House have proposed a five card cutoff. See S. REP. No. 368, *supra* note 5, at 7; H.R. REP. No. 894, *supra* note 41.

fifteen card limit is excessive, it is an improvement on section 1644 which does not penalize the possession of illegal credit cards. This new provision helps ease the government's burden of proof in credit card fraud cases because the government will not have to apprehend an individual in the act of committing credit card fraud.<sup>109</sup> Thus, the new Act should enable prosecutors to eschew using the unwieldy mail and wire fraud statutes.

Fourth, the new statute attempts to clarify the aggregation requirement.<sup>110</sup> In cases involving devices that are unauthorized but not counterfeit, the courts will aggregate the value of the criminal's credit fraud, regardless of the number of cards involved.<sup>111</sup> This provision will help eliminate the problems of the aggregation requirement in section 1644.<sup>112</sup>

Fifth, the new statute punishes both those persons who produce counterfeit credit cards<sup>113</sup> and those persons who possess device making equipment.<sup>114</sup> Furthermore, the omission of a minimum statutory amount requirement in cases involving counterfeit credit cards<sup>115</sup> indicates Congress' intent to simplify the proof of counterfeiting. Because most counterfeiters are involved in large fraudulent schemes, the omission of a minimum statutory amount requirement fortunately will not cause a significant increase in the number of federal prosecutions of counterfeiting. The omission simply will reduce the prosecutor's burden of proof in counterfeiting cases.

The Credit Card Fraud Act apparently is not a replacement for section 1644; rather, it supplements the already existing credit card fraud statute.<sup>116</sup> Presumably, once federal prosecutors have become accustomed to the new statute, they will employ primarily the new statute because it simplifies their burden of proof and increases the potential penalty for those convicted of credit card fraud.<sup>117</sup>

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<sup>109</sup> See *supra* notes 70-73 and accompanying text.

<sup>110</sup> The statute punishes any person who "knowingly and with intent to defraud traffic in or uses one or more unauthorized devices during any one-year period, and by such conduct obtains anything of value aggregating \$1,000 or more during that period. . . ." 18 U.S.C. § 1029(a)(2).

<sup>111</sup> *Id.* The statute thus follows the approach of *United States v. Mikelberg*, 517 F.2d 246 (5th Cir. 1975), *cert. denied*, 424 U.S. 909 (1976). See *supra* notes 62-65 and accompanying text.

<sup>112</sup> See *supra* notes 59-61 and accompanying text.

<sup>113</sup> 18 U.S.C. § 1029(a)(1).

<sup>114</sup> 18 U.S.C. § 1029(a)(4).

<sup>115</sup> 18 U.S.C. § 1029(a)(1).

<sup>116</sup> Congress did not mention the coexistence issue in the Credit Card Fraud Act. See 18 U.S.C. § 1029.

<sup>117</sup> Prosecutors, however, probably will continue to use § 1644 to prosecute collusive



Despite all these improvements, the new Act may have created some problems. First, the definition of credit card now apparently includes automated banking cards<sup>118</sup> and electronic fund transfers.<sup>119</sup> Congress, in its hurried attempt at the end of the session to pass the Comprehensive Crime Control Act,<sup>120</sup> may have attempted to do too much. Congress apparently did not consider carefully the significance of the differences between transactions involving electronic fund transfers<sup>121</sup> and automated banking cards, as compared to credit card transactions.<sup>122</sup> For example, the transactions differ in both the technology and the schemes used to commit fraud. Thus, the problems of electronic fund transfers and automated banking cards warrant separate treatment, yet the Act deals with them as if they were credit cards.

Second, in exceptional cases the statute is unjust. For example, a person who steals an account number and uses it to buy seven hundred dollars of merchandise has not violated section 1029, but a person who commits the same crime with a fraudulent account number is guilty of a federal crime.<sup>123</sup> These individuals are similarly situated, yet only the person who used the imaginary account number has violated section 1029. If a person uses a fraudulent account number to buy twenty dollars of merchandise, that person also has violated section 1029. This unequal treatment of similarly situated persons may constitute a violation of the equal protection clause.<sup>124</sup>

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merchants and persons who received goods that were purchased with illegal credit cards because prosecutors can use § 1029 only if they can demonstrate the existence of a conspiracy. See 15 U.S.C. § 1644(d-f); 18 U.S.C. § 1029. Due to the many elements of the crime of conspiracy, it is difficult for prosecutors to prove.

<sup>118</sup> Automated banking cards are used to deposit or withdraw money from a bank electronically. See, e.g., U.S. NEWS & WORLD REP., *supra* note 5, at 79.

<sup>119</sup> See 18 U.S.C. § 1029(e)(1) (defines "credit card").

<sup>120</sup> The House did not discuss the Credit Card Fraud Act (which was just an amendment to the continuing appropriations bill), while the Senate passed a similar bill earlier that year. S. 1870, 98th Cong., 2d Sess., 130 CONG. REC. S4824 (daily ed. April 25, 1984). Thus, Congress never examined the impact of this legislation on electronic fund transfers or automated bank cards.

<sup>121</sup> The issue of electronic fund transfers is so complicated and controversial that there is a federal statute devoted solely to that subject. See Electronic Fund Transfer Act, 15 U.S.C. § 1693 (1982).

<sup>122</sup> Automated bank card frauds usually involve relatively minor amounts. See U.S. NEWS & WORLD REP., *supra* note 5, at 79. Therefore, a federal statute is probably an inappropriate method by which to approach the problem because minor frauds are best prosecuted by the states. See *supra* note 20 and accompanying text.

<sup>123</sup> The penalties for the two types of crimes are very different, and hence, also could cause an injustice. See *infra* notes 125-34 and accompanying text.

<sup>124</sup> See J. NOWAK, R. ROTUNDA & I. YOUNG, CONSTITUTIONAL LAW 818-19 ("unfair

## B. PENALTIES

The penalties under the Credit Card Fraud Act<sup>125</sup> and the Truth in Lending Act<sup>126</sup> for the unauthorized use or possession of credit cards are essentially the same. Both acts set a maximum of ten years in prison and a ten thousand dollar fine.<sup>127</sup> The new statute, however, also provides for a greater monetary penalty in egregious cases.<sup>128</sup> This provision has the same beneficial deterrent effect as a restitution provision.<sup>129</sup>

Under the Credit Card Fraud Act, counterfeiting or possession of device-making equipment also carries a greater penalty than other types of credit card fraud.<sup>130</sup> The statute provides for "a fine of not more than the greater of \$50,000 or twice the value obtained by the offense or imprisonment for not more than fifteen years, or both. . . ."<sup>131</sup> This stringent penalty should deter any criminal, even a member of organized crime.<sup>132</sup> Although the penalty should be an effective deterrent for counterfeiting, in rare cases it might cause inequitable treatment,<sup>133</sup> and thereby possibly violate the equal protection clause.<sup>134</sup>

## V. CONCLUSION

This Comment has examined the present state of credit card fraud. The enormous impact of credit cards in our society cannot be overemphasized. Unfortunately, credit card fraud is increasing even faster than overall credit card use. The losses resulting from credit card fraud are staggering, and the unfortunate result is that customers bear those losses.

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treatment" of individual by criminal justice system is violation of equal protection clause).

<sup>125</sup> See 18 U.S.C. § 1029(c)(1).

<sup>126</sup> See 15 U.S.C. § 1644 (1982).

<sup>127</sup> 15 U.S.C. § 1644(f).

<sup>128</sup> The Credit Card Fraud Act of 1984 prescribes "a fine of not more than the *greater* of \$10,000 or twice the value obtained by the offense. . . ." 18 U.S.C. § 1029(c)(1) (emphasis added).

<sup>129</sup> See *Senate Hearing*, *supra* note 5, at 12 (statement of James Knapp, Deputy Assistant Attorney General for the Criminal Division of the Department of Justice).

<sup>130</sup> 18 U.S.C. § 1029.

<sup>131</sup> *Id.*

<sup>132</sup> When a person's conviction for counterfeiting is not that person's first violation of § 1029, the statute increases the penalty to "a fine of not more than the greater of \$100,000 or twice the value obtained by the offense or imprisonment for not more than twenty years, or both. . . ." 18 U.S.C. § 1029(c)(3).

<sup>133</sup> See *supra* notes 123-24 and accompanying text.

<sup>134</sup> See J. NOWAK, R. ROTUNDA & I. YOUNG, *supra* note 124, at 821 (equal protection clause provides an individual the right to "fair treatment" in sentencing).

The key to reducing large credit card fraud schemes is a well-written federal statute. Although the states have a vital role in small cases, they are not capable of prosecuting large interstate schemes effectively. Card issuers have taken measures to limit credit card fraud and these measures can have some short-term impact. Criminals, however, are able to overcome issuers' new obstacles in a short period of time. Cardholders also are unable to prevent misuse because they often are unaware of the fraud until they receive their monthly credit card statements.

The old federal statutory scheme has several shortcomings. It is unclear whether section 1644 prohibits the unauthorized use of an account number. The aggregation requirement also is uncertain. Furthermore, the statute does not prohibit the possession of "bad" credit cards; therefore, prosecutors frequently had to use the unwieldy mail and wire fraud statutes.

The Credit Card Fraud Act of 1984 corrects most of the problems of previous federal statutory schemes. The new statute punishes fraudulent use of an account number, eliminates the "fraudulently obtained" loophole of the old statute, punishes mere possession of illegal credit cards, clarifies the aggregation requirement, and punishes the counterfeiting of credit cards and possession of counterfeiting equipment. The new statute, however, has two major flaws: first, it defines "credit card" too broadly; and second, it treats certain similarly situated individuals unequally.

In addition to redefining "credit card" so to exclude automated bank cards and electronic fund transfers from the ambit of the new statute, and eliminating the potentially unequal operation of the statute upon similarly situated individuals, Congress needs to amend the Financial Privacy Act to allow authorities greater access to issuer records. Furthermore, the federal government should devote greater resources to the investigation of credit card fraud. These changes are necessary to combat the formidable problem of credit card fraud.

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